Supreme Court, U.S.
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No. 97-

IN THE

Supreme Court of the United States

OCTOBER TERM, 1997

MANUEL BURGO, JR.,

Petitioner,

v.

GENERAL DYNAMICS CORPORATION,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT.

PETITION FOR A WRIT OF CERTIORARI.

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February 13, 1998

BATEMAN & SLADE, INC. BOSTON, MASSACHUSETTS

15 PP

QUESTION PRESENTED FOR REVIEW

The question presented is whether an employee who successfully defends an employer's appeal of an assessment of additional compensation under the Longshore and Harbor Workers' Compensation Act., 33 U.S.C. Section 914(f) should be awarded attorney's fees, costs and interest against the employer.

The ruling by the United States Court of Appeals for the Second Circuit denying an award of attorney's fees, costs and interest to the employee is in conflict with decisions of other United States Courts of Appeal and this issue raises an important question of federal law that has not been, but should be, settled by the Supreme Court.

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OPINIONS BELOW

The opinion and judgment of the United States Court of Appeals for the Second Circuit in *Burgo v. General Dynamics Corporation*, 122 F. 3d 140 (2d Cir. 1997) rehearing denied (November 17, 1997) is reproduced in the Appendix.

JURISDICTION

The ruling of the United States Court of Appeals for the Second Circuit, affirming the judgment of the United States District Court for the District of Connecticut was entered on August 27, 1997. The Court awarded supplemental compensation but denied petitioners request for interest, expenses and attorney's fees. Jurisdiction was in accordance with 33 U.S.C. Section 918(a). The petitioner filed a timely petition for rehearing. An order denying petition for rehearing was entered November 17, 1997. This petition is filed within ninety (90) days of that date. The Court has jurisdiction to review on a writ of certiorari pursuant to 28 U.S.C. Section 1254 (1).

STATUTES INVOLVED

33 U.S.C. § 914 (f) provides:

> If any compensation, payable under the terms of an award, is not paid within ten days after it becomes due, there shall be added to such unpaid compensation an amount equal to 20 per centum thereof, which shall be paid at the same time as, but in addition to, such compensation, unless review of the compensation order making such award is had as provided in section 21 and an order staying payments has been issued by the Board or court.

33 U.S.C. § 918 (a) provides in pertinent part:

> In case of default by the employer in the payment of compensation due under any award of compensation for a period of thirty days after the compensation is due and payable, the person to whom such compensation is payable may, within one year after such default, make application to the deputy commissioner making the compensation order or a supplementary order declaring the amount of the default. After investigating, notice, and hearing, as provided in section 19, a deputy commissioner shall make a supplementary order, declaring the amount of the default, which shall be filed in the same manner as the compensation order.... The applicant may file a certified copy of such supplementary order with the clerk of the Federal district court for the judicial district in which the employer has his principal place of business or maintains an office, or for the judicial district in which the injury occurred.... Such supplementary order of the deputy commissioner shall be final, and the court shall upon the filing of the copy enter judgment for the amount declared in default by the supplementary order if such supplementary

> order is in accordance with law. Review of the judgment so entered may be had as in civil suits for damages at common law.... No fee shall be required for filing the supplementary order nor for entry of judgment thereon, and the applicant shall not be liable for costs in a proceeding for review of the judgment unless the court shall otherwise direct....

33 U.S.C. § 928 (a) provides:

> If the employer or carrier declines to pay any compensation on or before the thirtieth day after receiving written notice of a claim for compensation having been filed from the deputy commissioner, on the ground that there is no liability for compensation within the provisions of the Act, and the person seeking benefits shall thereafter have utilized the services of an attorney at law in the successful prosecution of this claim, there shall be awarded, in addition to the award of compensation, in a compensation order, a reasonable attorney's fee against the employer or carrier in an amount approved by the deputy commissioner, Board, or court, as the case may be, which shall be paid directly by the employer or carrier to the attorney for the claimant in a lump sum after the compensation order becomes final.

33 U.S.C. § 928 (d) provides in pertinent part:

> The amounts awarded against an employer or carrier as attorney's fees, costs, fees and mileage for witnesses shall not in any respect affect or diminish the compensation payable under this Act.

STATEMENT OF THE CASE

The petitioner, Manuel Burgo, Jr. filed claims with the United States Department of Labor against his employer, General Dynamics for work related injuries covered under the Longshore and Harbor Workers' Compensation Act (LHWCA), 33 U.S.C. Sec. 901 et seq. The petitioner and respondent reached a lump sum settlement for $140,000.00, which was approved by Administrative Law Judge David W. D'Nardi on August 31, 1994, under 33 U.S.C. Section 908(i). The LHWCA District Director formally filed the Order approving the settlement in his office on September 13, 1994, which required pursuant to 33 U.S.C. Section 914(f) that the respondent make payment within ten days after becoming due or be penalized an additional twenty percent. The respondent received the Order on September 16, 1997, and mailed a check to the petitioner's attorney on September 19, 1994. The petitioner's attorney received the check on September 26, 1994.

The petitioner contended that the settlement proceeds were not received within ten days after becoming due on September 13, 1994, when the Order was filed, and that he was entitled to an additional twenty percent compensation. The respondent failed to pay the additional compensation under Section 914(f).

Therefore, on October 31, 1994, the petitioner requested the LHWCA District Director to issue a Supplemental Compensation Order awarding the additional $28,000 in compensation. The LHWCA District Director indicated that the respondent and it's insurance carrier submitted "information" contesting the Supplemental Compensation Order on the theory that the ten day period provided for in Section 914(f) excludes interim weekends and holidays. However, neither the respondent, nor it's insurance carrier requested a hearing on the supplemental compensation claim until after the District Director conclusively ruled that supplemental compensation was due.

On November 17, 1994, the District Director issued a Supplemental Compensation Order awarding the petitioner

Supplemental Compensation in the amount of $28,000, on the grounds that the respondent did not pay the settlement within ten days of it becoming due, as the September 13, 1994 order directed. [App.1a]

Counsel for the respondent filed a motion for reconsideration of the award order on November 23, 1994, contending that the District Director failed to calculate accurately the ten-day payment period under Section 914(f), in accordance with Fed. R. Civ. P. 6(a).

After filing a motion for reconsideration, the respondent requested a hearing with the District Director. Although the District Director denied the request for a hearing, he did consider the respondent's argument. Nonetheless, the District Director denied the reconsideration request on December 5, 1994. The District Director based his decision on the strict interpretation of the language of Section 914(f) of the Act, finding that Section 914(f) contains the express statutory provision to prevail over the rules specified in 6(a) of the Federal Rules of Civil Procedure. [App.8a]

The respondent filed an appeal with the Benefits Review Board established by the Secretary of Labor on August 29, 1995. The Benefits Review Board properly held that it lacked jurisdiction to hear the defendant's appeal of the District Director's Supplemental Compensation Order. The Benefits Review Board assessed an attorney's fee and expenses against the respondent.

On March 29, 1995, the petitioner filed a complaint with the United States District Court for the District of Connecticut to enforce the supplemental compensation order pursuant to 33 U.S.C. Section 918(a). On January 31, 1996, the District Court found the complaint to be defective. The petitioner then filed with the District Court an amended petition for the enforcement of the supplemental compensation order on June 17, 1996. The District Court entered judgment on the supplemental compensation order dated June 17, 1996, and clarification of judgment *nunc pro tunc* was filed on June 20, 1996. [App.14a]

On September 13, 1996, the respondent filed a motion for relief from judgment of the supplementary compensation order granted on June 18, 1996, pursuant to Fed. R. Civ. P. 60(b).

The defendant claimed that by reasons of mistake or inadvertence the District Court was not aware of all the facts involving whether the Order was in accordance with the law. On December 24, 1996, the District Court issued an Order denying the defendants motion for relief from judgment. [App.16a]

Pursuant to 33 U.S.C. Section 918(a), General Dynamics Corporation appealed from the judgment of the United States District Court for the District of Connecticut awarding Manuel Burgo, Jr. $28,000.00 under a supplemental compensation order issued pursuant to the Longshore and Harbor Workers' Compensation Act, 33 U.S.C. Section 914(f) and 918(a).

On August 27, 1997, the United States Court of Appeals for the Second Circuit affirmed the judgment of the United States District Court for the District of Connecticut but denied Mr. Burgo's request for attorney's fees, expenses and interest in his successful defense of General Dynamic's appeal. [App.27a] The parties filed timely petitions for rehearing which were denied on November 17, 1997. [App.39a]

REASON FOR GRANTING CERTIORARI

IN DENYING THE REQUEST FOR AN AWARD OF ATTORNEYS FEES, EXPENSES AND INTEREST, THE DECISION OF THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT IS IN CONFLICT WITH DECISIONS OF OTHER UNITED STATES COURTS OF APPEAL AND THE ISSUE RAISES AN IMPORTANT QUESTION OF FEDERAL LAW THAT HAS NOT BEEN, BUT SHOULD BE, SETTLED BY THE SUPREME COURT.

The United States Court of Appeals For The Second Circuit in the case at bar had ruled that "section 928(a), which allows for an award of attorney's fees only if the employer 'declines to pay any compensation,' does not authorize an award of fees where the employer contests a §914(f) penalty payment." *Burgo v. General Dynamics Corporation*, 122 F. 3d 140 (2d Cir. 1997) [App.38a] In denying Burgo's petition for rehearing, the Second Circuit, again stated "§928's authorization of attorney's fees applies only to the successful prosecution of a 'claim for compensation', and does not authorize this kind of relief when a plaintiff seeks and recovers a §914(f) penalty, which was the relief Burgo obtained," (Rehearing decision at 7351, [App.41a].)

In *Hisle v. Lousiana Dock Company*, 798 F.2d 469, 1986 WL 17204 (6th Cir.), [App.42a] the United States Court of Appeals for the Sixth Circuit ruled in a case, similar to the case at bar, that the claimant was entitled to recover attorney's fees in successfully defending an employer's appeal of a judgment awarding 33 U.S.C. Section 914(f) additional compensation benefits. The Court believed the provisions of Section 928(a) should not be narrowly construed [App.50a] and that the legislative history of Section 928:

> ...indicates that the statute is designed to ensure that injured employees will recover the full amount

> contemplated by the Act and that the cost of legal services will not diminish the benefits recovered. It is also a clear expression of Congressional intent that employers should pay legitimate claims by injured employees without lengthy and burdensome litigation (citations omitted). Those legislative objectives are best met by a construction of section 918 which allows for recovery of attorney's fees when claimants are forced to file a lawsuit in order to compel payment of supplementary compensation orders.

[App.5[illegible]

This reasoning is supported by the language in 33 U.S.C. Section 918(a) which provides that "no fee shall be required for filing the supplementary order nor for entry of judgment thereon, and the applicant shall not be liable for costs in a proceeding for review of the judgment unless the court shall otherwise direct" 33 U.S.C. Section 918(a).

Also, in *Quave v. Progress Marine*, 918 F.2d 33 (5th Cir. 1990), the United States Court of Appeals for the Fifth Circuit affirmed a District Court award of attorney's fee's where the claimant obtained an award of interest in an enforcement proceeding. The court considered an award of interest as part of 'just compensation.' 918 F.2d at 34 .

The decision of the United States Court of Appeals for the Second Circuit is also in conflict with a 1997 decision of the United States Court of Appeals for the Federal Circuit. In *Ingalls Shipbuilding, Inc v. Dalton*, 119 F.3d 972 (Fed. Cir. 1997), the Court held that additional compensation that a Navy contractor had to pay under 33 U.S.C. Section 914(e) for overdue payments without award, was not in the nature of a "fine or penalty", but

rather was compensation. The Court noted that Section 914 is entitled "Payment of Compensation," that other sections of the Act specifically provide for "fines" and "penalties" whereas Section 914(e) [and for that matter 914(f)] does not use the word fine or penalty. *Id.* at 977. Also, 33 U.S.C. §944(c)(3) requires that "all amounts collected as fines and penalties" be paid into a special fund used to administer the LHWCA. *Id.* at 977. Since Section 914(e) penalties are paid to the individual claimants and not the special fund, it indicates that Congress did not consider Section 914(e) payments to be fines or penalties. *Id.* at 977. Additionally, Section 914(e) payments are not in the nature of a penalty since they are assessed in relation to the harm suffered. *Id.* at 978. The Court was not persuaded by other judicial opinions which casually referred to Section 914(e) payments as penalties as a convenient way to distinguish the Section 914(e) awards from the underlying awards. *Id* at 979 Finally, the Court ruled that Section 914(e) payments are not any form of interest. *Id.* at 979.

In the present case, the order of the District Director which formed the basis of the complaint in the District Court is entitled "Supplemental Compensation Order" [App.1a]. Additionally, the District Court ruled that because Burgo's "compensation award" was pending on appeal, his fee Application would be denied without prejudice. (Order of District Court, [App.25a]). General Dynamics did not appeal from or seek a reversal of such order, so it remains the law of the case. And consistent with that position, General Dynamics in its reply brief before the United States Court of Appeals for the Second Circuit admitted that Burgo "may make a fully documented application to this court for attorney's fees for work done before the Court of Appeals."

The Benefits Review Board, which is charged with interpretation and application of the Longshore Act, consistently holds that Section 914(f) awards are "compensation" requiring the

assessment of interest. *See McKamie v. Transworld Drilling Co.*, 7 BRBS 315, 320 (1977):

> The claimant appeals contending that interest should have been assessed on the additional $2800 due under Section 14(f) of the Act.... The Board agrees with the claimant. The $2800 is additional compensation, payable under Section 14(f)... Interest on unpaid compensation past due is mandatory.

(Citations omitted.)

See also Barry v. Sea-Land Services, Inc, 27 BRBS 260, 265 (1993) *aff'd* 41 F. 3d 903 (3rd Cir. 1994).

The Board has held that the term "compensation" as used in Section 928 is a generic term encompassing all forms of relief potentially available under the Act. *Timmons v. Jacksonville Shipyard, Inc*, 2 BRBS 125 (1975)

Similarly, the Benefits Review Board has ruled that Section 914(f) awards are "compensation" *requiring an award of attorney's fees* under 33 U.S.C. § 928. *See McDonald v. Sun Shipbuilding & Dry Dock Co.*, 10 BRBS 734, 735 (1978):

> The claimant appeals contending that the administrative law judge erred as a matter of law by not awarding an attorney's fee where the administrative law judge had awarded additional compensation in the form of interest and the additional assessment of compensation pursuant to Section 14. We agree and reverse the administrative law judge's holding that the

> claimant's counsel was not entitled to an attorney's fee.
>
> Section 28, 33 U.S.C. § 928, provides that a reasonable attorney's fee should be awarded if as a result of claimant's attorney's efforts, compensation is gained. Clearly, the award of interest and the award under Section 14(e) must be considered as compensation gained for the purpose of Section 28 of the Act. *See Branda v. Universal Maritime Service Corp.*, 7 BRBS 546, BRB No. 77-710 (Jan. 27,1978).

See also Smelcer v. National Steel & Shipbuilding Co. 16 BRBS 117 (1984) *Fairly v. Ingalls Shipbuilding*, 25 BRBS 61 (1991)

Both the Third Circuit and the Ninth Circuit have concluded that allowing an employer to delay compensation payments interest free would reduce the worth of such payments to claimant, thereby undermining the remedial intent of the Act. *Sea-Land Service, Inc. v. Barry*, 41 F. 3d 903 (3rd Cir. 1994); *Foundation Constructors, Inc. v. Director, O.W.C.P.*, 950 F.2d 621 (9thCir. 1991). The same remedial intent warrants the assessment of fees, interest and costs in the present matter.

The only case mentioned in the relevant portion of the opinion of the Second Circuit in Mr. Burgo's case is *Strachan Shipping Co. v. Wedemeyer*, 452F.2d 1225 (5th Cir. 1971)452 F. 2d 1225(5th Cir. 1971). In that case, both the district and appellate courts affirmed the authority of the deputy commissioner to award interest on compensation awards. The dictum quoted by the Second Circuit contrasts §914(e) and §914(f) awards with an interest award and concludes that they do not resemble interest. *Id.* at 1228. The dictum does NOT suggest that §914(e) and §914(f) awards fall outside the statutory provision for compensation .

The intent of the Longshore Act is aptly summed up in *Strachan Shipping Co. v. Wedemeyer* in a quote from the Supreme Court of Florida:

> The compensation act is to be construed in favor of the working man. Not only have we said this on many occasions but the act itself so provides. Section 440.26, F.S.A. If an employer controverts the right to compensation, the penalty fixed by the law for an unsuccessful contest is not only the payment in full of the award from the beginning but also attorneys' fees and other specified costs... Inherent in the act itself is the intention that if such an award is wrongfully withheld (and under the law it is wrongfully withheld if it be eventually determined that it should have been paid), the person or the party which should have paid it should be compelled to pay, as damages for its detention, lawful interest thereon from the date it should have been paid

Id. at 1229-30 (quoting *Parker v. Brinson Construction Company*, Fla. 1955, 78 So.2d 873, 875). Under the statutory scheme, an employer is "penalized" under the Act by having to pay the full award plus fees and costs. All three elements - award, fees, costs - are "compensation", although together they constitute "the penalty fixed by the law".

Clearly there is a serious conflict between the Second Circuit and other United States Courts of Appeal on the issue of whether interest should be awarded where an employer was held liable for the payment of additional compensation under 33 U.S.C. Section 914(f). The Fifth Circuit in *Strachan Shipping Company*, supra, the third Circuit in *Barry*, *supra*, and the Ninth Circuit in *Foundation Contractors, Inc.*, *supra* and the Federal Circuit in

Ingalls, supra upheld awards of interest on the late payment of benefits under 33 U.S.C. 914(f) whether characterized as "additional compensation" or a "Section 14(f) Penalty".

The issue of attorney's fees for successfully prosecuting a claim for Section 914(f) benefits and interest have been upheld or awarded against the employer, by the Fifth Circuit in *Quave, supra* and, the Sixth Circuit in *Hisle, supra.*

The issue before the Court raises an important question of federal law. Allowing an employer to delay compensation payments by appealing a Section 914(f) assessment for defaulting on a Compensation order, without compensating the claimant for the delay and cost of the contest, including interest and attorneys fees, would reduce the value of such payments to claimants and undermine the remedial intent of the Act.

The provisions of 33 U.S.C. 928(d) so states:

> The amounts awarded against an employer or carrier as attorney's fees, costs, fees and mileage for witnesses shall not in any respect affect or diminish the compensation payable under this Act.

Claimants would not pursue enforcement of Section 914(f) awards when resisted by late paying employers, especially if the award is small in relation to the litigation costs associated with an enforcement action, including appellate proceedings.

For all practical purposes Employee's will no longer have recourse against non complying employers as they will no longer have access to legal services, nor be reimbursed for expenses, costs or interest in the enforcement of compensation orders under the Longshore and Harbor Workers' Compensation Act.

CONCLUSION

For the above reasons, Manual Burgo, Jr. respectfully requests that the Court allow his petition for a writ of certiorari.

Manuel Burgo, Jr.
By his attorneys

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APPENDIX A.

UNITED STATES
DEPARTMENT OF LABOR

OFFICE OF
WORKERS' COMPENSATION PROGRAMS

FIRST COMPENSATION DISTRICT

In the matter of the claim for compensation under the Longshore and Harbor Workers' Compensation Act	SUPPLEMENTAL COMPENSATION ORDER
Manuel Burgo, Jr. Claimant	Section 14(f) Penalty
v.	CASE NO. 1-86652/ 1-126661
General Dynamics Corporation/CT Employer,	
National Employers Company Insurance Carrier	

COMPENSATION ORDER - CONTINUED

On August 31, 1994, a Decision and Order was issued in the above -captioned case awarding the claimant compensation under Section 8(i) of the Act in the amount of $140,000.00. In addition, the employer, General Dynamics Corporation, continued do be responsible for providing medical services involving work-related injuries, subject to the provisions of Section 7 of the Act. Subsequently, the District Director filed the said order in his office on September 13, 1994.

The claimant through his representative applied for a Supplemental Compensation Order awarding the amount of 20 percent additional compensation pursuant to Section 14(f) of the Act. The employer/insurance carrier, National Employers Company(NEC), submitted additional information to argue against assessment of the penalty.

The claimant received the check(s) from NEC on September 26, 1994 and submitted exhibits to support this contention. A copy of the envelope (containing the checks) showed a postal indicia, September 19, 1994, Groton, Conn. In response NEC indicated that the check(s) were sent by certified mail on September 19, 1994. Also, NEC included a copy of General Dynamics's postal record.

Section 14(f) of the Act provides, in part, that if any compensation under the terms of the award, is not paid within ten days after it becomes due, there will be added to such unpaid compensation an amount equal to 20 per centum. The application of the Section 14(f) assessment is mandatory and leaves the deputy

COMPENSATION ORDER - CONTINUED

commissioner (district director) without any discretion as to whether to assess it. Matthews v. Newport News Shipbuilding & Dry Dock Co., 22 BRBS 440,442 (1989).

Further, an award becomes due under Section 14(f) when it is filed in the deputy commissioner's office. McCrady v. Stevedoring Servs. of America, 23 BRBS 106, 110 (1989). The Board holds that were notice of filing is given by mail, three days will not be added to the prescribed 10-day period. Barry v. Sea-Land Services, Inc., 27 BRBS 260, 263 (1993).

When payment of compensation under an award is made by check, the relation back doctrine applies. If the check is honored and paid by the payee bank, the time of payment for the purposes of Section 14(f) relates back to the time the check was delivered to the obligee. Seward, 13 BRBS at 502. In addition, the common-law rule on the time of payment, recognized by the Board, states that when payment is sent by mail, the time of payment is the date payment is received by the payee and not the date it was mailed. McKamie v. Transworld Drilling Co., 7 BRBS 315, 319 (1977). Although the Ninth Circuit and the Fifth Circuit offer alternative interpretations of time frames pursuant to Section 14(f), this jurisdiction does not speak directly to this issue.

In summary, the evidence presented by the parties indicates that the employer/carrier did not meet the ten day time limit imposed by the Act. The ten day limit expired on Friday, September 23, 1994. The check(s), itself, did not reach the claimant until September 26, 1994. In this instance, the date of mailing (by NEC), September 19, 1994, is not sufficient to satisfy the mandate of Section 14(f).

COMPENSATION ORDER – CONTINUED

The District Director has made such further investigation as he considers necessary and now makes the following:

FINDINGS OF FACT

1. The employer/insurance carrier, General Dynamics Company and National Employers Company, did not pay compensation as directed by the Order filed on September 13, 1994.

2. Compensation is due the claimant in the amount of $28,000.00 (20 percent of $140,000.00), as prescribed by Section 14(f) of the Act as the employer/insurance carrier did not pay compensation within ten days after it became due.

Upon the foregoing findings of fact, the District Director makes the following:

AWARD

Under the facts and circumstances herein, the District Director herewith declares that the employer, General Dynamics Corporation, and the insurance carrier, National Employers Company, will pay as additional compensation to the claimant the sum of $28,000.00 due under Section 14(f) of the Act.

COMPENSATION ORDER – CONTINUED

Given under my hand and
filed at Boston Ma.,
on this day, November 17, 1994

_____

RANDOLPH L. REGULA
DISTRICT DIRECTOR/LHWCA
FIRST COMPENSATION DISTRICT
BOSTON MA 02114

COMPENSATION ORDER - CONTINUED

CERTIFICATE OF FILING AND SERVICE

I certify that on November 17, 1994 the foregoing Compensation Order was filed in the Office of the District Director, First Compensation District and a copy thereof was mailed on said date by certified mail to the parties and their representatives at the last known address of each as follows:

Claimant
Manuel Burgo, Jr.
366 LaGrange Street
West Roxbury, MA 02132

Claimant's Counsel
William Batty, Esquire
Batty & Stein
80 Boylston Street
Boston, MA 02116

Employer:
General Dynamics Corporation
Eastern Point Rd.
Groton, CT 06340

Carrier:
National Employers Company
2 Union Plaza
New London, CT 06320

COMPENSATION ORDER – CONTINUED

Carrier's Counsel:
Murphy & Beane
P.O. Box 590
New London, CT 06320

_____

RANDOLPH L. REGULA
District Director
First Compensation District
U.S. DEPARTMENT OF LABOR
Employment Standards Administration
Office of Workers' Compensation Programs
Division of Longshore and Harbor Workers
One Congress St, 11th Floor
Boston Ma 02114

APPENDIX B.

UNITED STATES
DEPARTMENT OF LABOR

OFFICE OF
WORKERS' COMPENSATION PROGRAMS

FIRST COMPENSATION DISTRICT

In the matter of the claim for compensation under the Longshore and Harbor Workers' Compensation Act	DECISION ON: MOTION FOR RECONSIDERATION
Manuel Burgo, Jr. Claimant	
v.	CASE NO. 1-86652/ 1-126661
General Dynamics Corporation/CT Employer,	
National Employers Company Insurance Carrier	

On November 23, 1994 counsel for the employer, General Dynamics Corporation, submitted a timely Motion for Reconsideration pursuant to F.R.C. 802.206 (b) (1) and the compensation order of default filed in the office of the District

COMPENSATION ORDER – CONTINUED

Director on November 16, 1994. The employer contends that the Director failed to accurately calculate the ten day payment period pursuant to F.R.Civ. 6(a), as amended. This rule states that, in computing a time period prescribed or allowed, the intermediate Saturdays, Sundays and holidays are excluded if the time period is less than eleven days. The employer avers that, in the case sub judice, the intermediate Saturdays and Sundays (September 17, 18, 24, 25) are to be excluded, thus extending the deadline for timely payment to September 27, 1994.

In the instant case, it is undisputed that the order of Settlement was filed in the office of the Director on September 13, 1994; the employer mailed the check by certified mail on September 19, 194; the check was received by the claimant and his attorney on September 26, 1994.

Section 14(f) of the Act provides:

> If any compensation, payable under the terms of an award, is not paid within ten days after it becomes due, there shall be added to such unpaid compensation an amount equal to 20 per centum thereof, which shall be paid at the same time as, but in addition to, such compensation, unless review of the compensation order making such award is had as provided in section 21 and an order staying payments has been issued by the Board or court.

COMPENSATION ORDER - CONTINUED

The District Director holds to the strict interpretation of Section 14(f) adhering to the ten day calendar rule as opposed to the ten day business rule. Section 14(f) becomes self-executing and in every instance where payment is delayed the penalty provision is applicable. In this holding the District Director sets apart the applicability of F.R.Civ. 6(a), as amended, to Section 14(f) of the Act. In the opinion of the District Director, Section 14(f) of the Act contains the express statutory provision to prevail over the rules specified in 6(a) of the Federal Rules Of Civil Procedure.

DECISION ON MOTION FOR RECONSIDERATION

The District Director, hereby, disproves the reconsideration on the basis that Section 14(f) of the Act, as it applies to the ten day period of payment, is mandatory. The employer, General Dynamics Corporation, did not meet the ten day time limit imposed by the Act.

Given under my hand and filed at
Boston, MA, on this day,
December 5, 1994

Randolph L. Regula
District Director/LHWCA
First Compensation District
Boston, MA 02114

COMPENSATION ORDER - CONTINUED

CERTIFICATE OF FILING AND SERVICE

I certify that on December 5, 1994 the foregoing Compensation Order was filed in the Office of the District Director, First Compensation District and a copy thereof was mailed on said date by certified mail to the parties and their representatives at the last known address of each as follows:

Claimant
Manuel Burgo, Jr.
366 LaGrange Street
West Roxbury, MA 02132

Claimant's Counsel:
William Batty, Esquire
Batty & Stein
80 Boylston Street
Boston, MA 02116

Employer:
General Dynamics Corporation
Eastern Point Rd.
Groton, CT 06340

Carrier:
National Employers Company
2 Union Plaza
New London, CT 06320

COMPENSATION ORDER - CONTINUED

Carrier's Counsel:
Murphy & Beane
P.O. Box 590
New London, CT 06320

A copy was mailed by regular mail to the following:

Associate Solicitor of Labor for Employees Benefits, U.S. Department of Labor, Suite N-2716, NDOL, Washington, D.C. 20210

RANDOLPH L. RUGULA
District Director
First Compensation District
U.S. DEPARTMENT OF LABOR
Employment Standards Administration
Office of Workers' Compensation Programs
Division of Longshore and Harbor Workers
One Congress St, 11th Floor
Boston Ma 02114

APPENDIX C.

UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

MANUEL BURGO,	:	
Plaintiff,	:	
	:	**CIVIL NO. 3:95MCI22 (DJS)**
v.	:	
	:	
GENERAL DYNAMICS,	:	
Defendant.	:	

JUDGMENT

Pursuant to 33 U.S.C. §§914(f) and 918 (a), this court's order filed on February 1, 1996, and a certified copy of a supplemental compensation order issued on November 17, 1994 (Case No. 1-86652/1-126661), the clerk is hereby ordered to enter judgment in favor of the Petitioner, Manuel Burgo, in the amount of $28,000.00.

The clerk is further ordered to docket the Petitioner's "Amended Petition for the Enforcement of Supplemental Compensation Order Pursuant to U.S.C. §§914(f) and 918(a)."

IT IS SO **ORDERED.**

Dated at Hartford, Connecticut this 17th day of June, 1996.

Dominic J. Squatrito
United States District Judge

APPENDIX D.

UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

MANUEL BURGO,	:	
Plaintiff,	:	
	:	**CIVIL NO. 3:95MC122 (DJS)**
v.	:	
	:	
GENERAL DYNAMICS,	:	
Defendant.	:	

CLARIFICATION OF JUDGMENT NUNC PRO TUNC

The Court hereby clarifies, nunc pro tunc, its issuance of a Judgment in this matter on June 18, 1996.

Prior to entering Judgment for the Petitioner the court reviewed the supplemental compensation order attached to the Petitioner's Amended Petition (document # 6). The court's task in doing so is limited to assuring the district director[1] followed the procedural provisions of 33 U.S.C. §§918(a) and 919. See Schmit v. ITT Federal Electric Inter'l, 986 F. 2d 1103 (7th Cir. 1993). The district director must investigate the claimant's application, provide notice of the claim to interested parties, and provide the opportunity for a hearing. Schmit v. Federal Electric Inter'l, 780 F. Supp. 1213, 1216 (N.D. Ill.1991), aff'd, 986 F.2d 1103 (7th Cir. 1993). The supplemental compensation order as well as the

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[1] The term "district director" is interchangeable with "deputy commissioner." See Schmit v. Federal Electric Inter'l, 780 F. Supp. 1213, 1216 (N.D. Ill. 1991), aff'd, 986 F.2d 1103 (7th Cir. 1993).

district director's ruling on the Respondent's Motion for Consideration, both of which are attached to the Amended Petition, are properly certified. See Order filed February 1, 1996.

The certified copy of the supplemental compensation order indicates the Respondent submitted papers arguing against assessment of the penalty and after an adverse ruling was issued, it made a motion for reconsideration. See attachments, Amended Petition. The Respondent, therefore, had notice of the claim. Neither the Amended Petition not its attached certified copies of rulings mentioned above indicate the Respondent made any attempt to secure a hearing. In the case presently before the court, the Respondent has never objected to the original Petition nor the improperly certified copies of the very same rulings which the Petitioner this time submitted properly authenticated. Yet the Respondent has had actual notice of both the filings of the Petitioner this time submitted properly authenticated. Yet the Respondent has had actual notice of both the filings of the Petitioner as well as the court. Every filing by the Petitioner was actually provided to the Respondent, including the original Complaint. See Unsworn Aff. by William Batty (document # 3). In addition, the Respondent filed an appearance in this case on June 19, 1995. See Resp.'s Appearance (document #2). Because the Respondent has not objected to any of the Petitioner's or court's filings and because the Amended Petition and rulings by the district director attached thereto demonstrate the certified copy of the supplemental order is in accordance with law, the court hereby GRANTS the Petitioner's claim for $28,000.

IT IS SO **ORDERED.**

Dated at Hartford, Connecticut this 20th day of June, 1996.

Dominic J. Squatrito
United States District Judge

APPENDIX E.

UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

MANUEL BURGO,	:	
Plaintiff,	:	
	:	**CIVIL NO. 3:95mcl22 (DJS)**
v.	:	
	:	
GENERAL DYNAMICS,	:	
Defendant.	:	

MEMORANDUM OPINION

This Court entered judgment granting the plaintiff's supplemental compensation order on June 18, 1996. On September 13, 1996, the defendant, General Dynamics, filed a motion for relief from this judgment (Doc. #14), under Fed. R. Civ. P. 60(b), because of mistake or inadvertence. For the reasons stated below, the defendant's Motion for Relief From Judgment is denied.

I. FACTS

The facts of this case are not in dispute. The plaintiff, Manuel Burgo, filed claims with the United States Department of Labor against his employer, General Dynamics, for injuries he sustained arising out of his employment, pursuant to the Longshoremen's and Harbor Workers' Compensation Act ("LHWCA"), 33 U.S.C. § 901, et seq. (Pl.'s Amended Pet. (Doc. #6) at ¶5.) On August 31, 1994, Administrative Law Judge ("ALJ") David W. DiNardi awarded the plaintiff compensation in the amount of $140,000, under section 8(I) of the Act. (Id. at ¶ 6.)The

LHWCA District Director formally filed this order in his office on September 13, 1994 (Id at ¶7.), thereby triggering the ten-day period under § 914(f). The defendant received this order on September 16, 1994, and, on September 19, 1994, mailed a check in the amount ordered to the plaintiff's attorney. (Def.'s Mem. (Doc. #15) at 1.) The plaintiff's attorney received the check on September 26, 1994. (Id. at 1.)

The plaintiff contends that the proceeds were not received within ten days after becoming due, that is, ten days from when the order was filed on September 13, 1994. Pursuant to § 914(f) of the LHWCA, the plaintiff further claims that the defendant owes him additional compensation pursuant to the LHWCA § 914(f), which provides, in relevant part:

> [i]f any compensation, payable under the terms of an award, is not paid within ten days after it becomes due, there shall be added to such unpaid compensation an amount equal to 20 per centum thereof . . .

33 U.S.C. § 914(f). The defendant failed to pay the additional compensation under § 914(f). Therefore, on October 31, 1994, the plaintiff filed a request for a supplemental compensation order pursuant to § 918(a).

The LHWCA District Director indicated that the defendant and its insurance carrier submitted "information" contesting the supplemental compensation order (Supp. Comp. Order (Doc. #1) at 1.), on the theory that the ten-day period provided for in § 914(f) excludes interim weekends and holidays. However, neither the defendant, nor its insurance carrier, requested a hearing on the supplemental compensation claim until after the District Director conclusively ruled that supplemental compensation was proper. Holding that the defendant did not pay compensation within ten days of it becoming due, as the September 13, 1994, order directed, the District Director awarded the plaintiff supplemental

compensation in the amount of $28,000. (Supp. Comp. Order (Doc. #1) at 2-3.)

Counsel for the defendant filed a motion for reconsideration of the award order on November 23, 1994, contending that the District Director failed to calculate accurately the ten-day payment period under §914(f), in accordance with Fed. R. Civ. P. 6(a). Rule 6(a) states that when calculating a time period of less than eleven days, interim weekends and holidays should be excluded. Fed. R. Civ. P. 6(a). Using this method of calculation, the deadline for payment of the September 13, 1994, order would be September 27, 1994, thus making the defendant's September 26th payment timely.

On November 23, 1994, after filing a motion for reconsideration, the defendant requested a hearing with the District Director. (Def.'s Mem. (Doc. #15) at 2.) Although the District Director denied the request for a hearing (Id), he did consider the defendant's argument. (Dec. on Mot. for Recon. (Doc. #1).) Nonetheless, the District Director denied the reconsideration request on December 5, 1994. (Id.) The District Director based his decision on the strict interpretation of the language of § 914(f), finding that "[s]ection 914(f) of the Act contains the express statutory provision to prevail over the rules specified in 6(a) of the Federal Rules Of Civil Procedure." (Id at 2.)

On March 29, 1995, the plaintiff filed a complaint with this Court to enforce the supplemental compensation order. On January 31, 1996, this Court found the complaint to be defective. The plaintiff then filed with this Court an amended petition for the enforcement of the supplemental compensation order on June 17, 1996. This Court entered judgment on the supplemental compensation order on June 18, 1996, and clarification of judgment *nunc pro tune* was filed on June 20, 1996.

On September 13, 1996, the defendant filed a motion for relief from judgment of the supplementary compensation order granted on June 18, 1996, pursuant to Fed. R. Civ. P. 60(b). The defendant claims that by reasons of mistake or inadvertence this

Court was not aware of all the facts involving whether the order was in accordance with the law. It is this motion the Court currently considers in the following discussion.

II. SCOPE OF REVIEW

The LHWCA was enacted to give injured employees a vehicle for prompt and certain recovery of some damages; in return, the employees waive their right to claim full damages in civil proceedings. Likewise, employers gain lower limits on potential liability in return for foregoing common-law defenses. See Schmit, 986 F.2d at 1106 (citing Potomac Elec. Power Co. v. Director, Office of Workers' Compensation Programs, 449 U.S. 268, 282 (1980)). Congress enacted § 918(a) in order to provide a "quick and inexpensive mechanism for the prompt enforcement of unpaid compensation awards . . . " Tidelands Marine Serv. v. Patterson, 719 F.2d 126, 129 (5th Cir. 1983).

The LHWCA provides that substantive review of a compensation order is to be held internally, by a Benefits Review Board established by the Secretary of Labor; the LHWCA also provides that the United States Court of Appeals may review that order. 33 U.S.C. § 921. Congress, intending the district court to play a very limited role in executing the act, restricted the district court's role to enforcing administrative orders. Schmit v. Fed. Elec. Int'l, 780 F. Supp. 1213, 1217 (N.D.Ill. 1991). In determining whether a supplementary order is " in accordance with the law," the district court's review is limited to ensuring whether the District Director, before issuing the supplementary order, followed procedures set forth in 33 U.S.C. § 918(a). Abbott v. La. Ins. Guaranty Ass'n, 889 F.2d 626, 630 (5th Cir. 1989) cert. denied, 494 U.S. 1082 (1990); Schmit v. Fed. Elec. Int'l, 986 F.2d 1103, 1106 (7th Cir. 1993).

On August 29, 1995, the Benefits Review Board properly held that it lacked jurisdiction to hear General Dynamics's appeal of the District Director's supplemental order. (Joint Proposal Rec.,

Ex. 5.) Review of the District Director's supplemental default order is available only in enforcement proceedings in federal district court. (Id.) See Lauzon v. Strachan Shipping Co., 782 F.2d 1217, 1219, n. 2 (5th Cir. 1985); Tidelands Marine Serv. v. Patterson, 719 F.2d 126, 129 (5th Cir. 1983).

III. DISCUSSION

Under Rule 60(b)(1), of the Federal Rules of Civil Procedure, the court, in its discretion, may relieve a party from final judgment based upon "mistake, inadvertence, surprise or excusable neglect." This Court first must determine whether there has been a mistake or inadvertence invoking Rule 60(b)(1), as the defendant claims.

Apparently, the defendant claims in its Rule 60(b) motion, that judgment by this Court on June 18, 1996, should not have been entered on the supplemental compensation order. The mistake complained of is that the District Director's actions regarding the supplemental order were not "in accordance with the law." The defendant puts forth two reasons to support this contention: (A) the time period under § 914(f) was not calculated "in accordance with the law;" and (B) the District Director failed to grant the defendant a hearing.

A. Time Period Not Calculated "In Accordance With The Law."

The defendant's first argument is that the District Director did not calculate the ten-day time period for payment of compensation under § 914(f), "in accordance with the law," because he did not exclude interim weekends and holidays, as set forth in Fed. R. Civ. P. 6(a). The defendant claims that Rule 6(a) should control the time period calculation of § 914(f) because, under Fed. R. Civ. P. 81(a)(6), the Federal Rules of Civil Procedure shall apply to §§ 918 and 921, of the LHWCA. Although § 914 is not mentioned in Rule 81(a)(6), the defendant

contends that Rule 81(a)(6) applies because a § 914(f) assessment is a "supplementary order" within the meaning of § 918(a). See Quave v. Progress Marine, 912 F.2d 798, 800 (5th Cir. 1990), cert. denied, 500 U.S. 916 (1991).

> Federal Rule of Civil Procedure 81(a)(6) specifically provides that:
>
> [t]hese [Federal Rules of Civil Procedure] apply to proceedings for enforcement or review of compensation orders under the Longshoremen's and Harbor Workers' Compensation Act . . . U.S.C., Title 33, §§ 918, 921, except to the extent that matters of procedure are provided for in that Act.

Fed. R. Civ. P. 81(a)(6). This Court finds that calculation of the ten-day time period under § 914(f), does not incorporate Fed. R. Civ. P. 6(a), for several reasons.

First, the plain language of Fed. R. Civ. P. 81(a)(6) does not include § 914 of the LHWCA. Rule 81(a)(6) specifically sets apart the two sections it incorporates, §§ 918 and 921. Because § 914 is not mentioned, it apparently was excluded intentionally. Furthermore, Rule 81(a)(6) applies to "proceedings for enforcement or review under the Longshoremen's and Harbor Workers' Compensation Act . . ." Fed. R. Civ. P. 81(a)(6). The ten days to which § 914(f) refers is a time period for payment of compensation, and does not pertain to "proceedings for enforcement or review." Therefore, § 914 is not within the scope of Rule 81(a)(6). Reid v. Universal Maritime Serv. Corp., 41 F.3d 200, 202 (4th Cir. 1994).

Second, even assuming that Rule 81(a)(6) does not exclude § 914(f) of the LHWCA. § 914(f) already provides for matters of procedure, and. where "matters of procedure are provided for in that Act," the Federal Rules of Civil Procedure do not apply. Fed. R. Civ. P. 81(a)(6). See also 33 U.S.C. § 914(f). By analogy,

Courts have held that Fed. R. Civ. P. 4, which requires service with a summons and complaint, does not apply to 33 U.S.C. § 918(a) enforcement proceedings because proper enforcement procedures are provided for in the Act. See Jourdan v. Equitable Equip. Co., 889 F.2d 637, 639 (5th Cir. 1989); Delgado v. Becker and Assocs., 1993 WL 515776 (E.D.LA.). "The plain language of the statute directs the district court upon the filing of a copy of the order to enter judgment without further process." Delvado, 1993 WL 515776, *2. Similarly, a number of courts have refused to apply Fed. R. Civ. P. 6(e), in order to extend the ten-day period in § 914(f) by the three days that Rule 6(e) allows when notice of action is served by mail. See. e.g. Lauzon v. Strachan Shipping Co., 782 F.2d 1217 (5th Cir. 1985). "A reading of the entire act indicates that the remedies provided by the Act were meant to be prompt remedies." Lauzon v. Strachan Shipping Co., 602 F. Supp. 661, 663 (S.D.Tx. 1985), *a'ffd*, 782 F.2d 1217 (5th Cir. 1985).

Section 914(f) states that the District Director shall add twenty percent of the amount in default if compensation "is not paid within ten days after it becomes due." 33 U.S.C. § 914(f). The "[plain] language of the statute is clear. To find that it means anything other than simply 'ten days,' we need to add the word 'business' or some other similar language." Reid, 41 F.3d at 200. There is no such language indicating that ten days means a time period greater than ten days. In fact, extending the ten-day period by excluding interim weekends and holidays would undermine the expressed purpose of the LHWCA: to provide employees with a "quick and inexpensive mechanism for the prompt enforcement of unpaid compensation awards." Tidelands, 719 F.2d at 129; see also Schmit, 986 F.2d at 1106.

This Court finds that the District Director's calculation of the ten-day time period under 33 U.S.C. § 914(f) was "in accordance with the law." Therefore, the time period calculation does not constitute a mistake capable of invoking Rule 60(b).

B. Failure To Grant A Hearing After Defendant Motion For Reconsideration.

The defendant's second argument is that the District Director's actions are not in accordance with the law because the District Director failed to grant the defendant a hearing. Because this is a procedural argument, it falls within the scope of this Court's review.

The defendant failed to pay the compensation due, as awarded by the ALJ, in a timely manner, thus invoking § 914(f). The defendant then failed to pay the twenty percent additional compensation due under § 914(f). This default invoked § 918(a) of the Act, thereby requiring the District Director to follow procedures set forth in § 918(a). This section provides that: "after investigation, notice and hearing, as provided in section 919 of this title, the deputy commissioner shall make a supplementary order ...." 33 U.S.C. § 918(a). Section 919 of Title 33 provides that after filing a claim for compensation and providing notice to the employer, the deputy commissioner shall make "such investigations as he considers necessary in respect of the claim, and upon application of any interested party shall order a hearing thereon." 33 U.S.C. § 919(c).

The District Director followed these statutory procedures before he issued the supplemental order. Although the District Director issued the order without a hearing (Def.'s Mem. In Supp. Mot. For Rel. at 3.), this is not material because neither party requested a hearing before the District Director issued the order, and the statute does not require a hearing if one is not requested.

After the District Director issued the supplemental order, the defendant filed a motion for reconsideration of that order, and at that time requested a hearing. Without holding the requested hearing, the District Director denied the defendant's motion for reconsideration. The defendant argues that a hearing, once requested, is mandatory, and because the District Director failed to

hold the "mandated" hearing, his decision to deny the motion for reconsideration is not in accordance with the law. (Id at 4.)

The defendant fails to demonstrate, however, that a hearing is mandatory after a supplemental order is issued. The language of the LHWCA that the defendant cites to support his argument applies to the investigation and hearing of pending claims: "upon application of any interested party [the District Director] shall order a hearing thereon." 33 U.S.C. § 919(c). At the time the defendant applied for a hearing (after filing of the motion for reconsideration), the plaintiff's claim was no longer pending but already had been finally decided by the District Director. As the language of the statute indicates, § 919(C) applies to the time before the District Director issues a supplementary order: "[a]fter investigation, notice, and hearing, as provided in section 919 of this title, the [District Director] shall make a supplementary order . . ." 33 U.S.C. § 918(a). Section 918(a) goes on to specifically state that: "[s]uch supplementary order of the [District Director] shall be final . . ." The statutory language indicates that once the District Director renders a final decision, § 919(C) no longer applies. See 33 U.S.C. § 918(a).

When the defendant received notice that the plaintiff filed a claim for supplementary compensation pursuant to § 914(f), the defendant then had the opportunity to demand a hearing. See 33 U.S.C. § 919. The defendant failed to request a hearing at this time, and the language of the LHWCA does not guarantee him another opportunity for a hearing once the District Director issues the supplemental order.

The LHWCA provides that a "supplementary order of the deputy commissioner shall be final," 33 U.S.C. § 918(a), and the Court finds no decisions which support the defendant's contention that the District Director is required to hold a hearing once a final decision has been made. In fact, the only relevant case this Court could find addressing this issue held that "no additional hearing is required where a final adjudication of default has been made on the part of the employer. " Jourdan v. Equitable Equip. Co. 1989 WL

11089 (E.D.LA.); relying on Lauzon v. Strachan Shipping Co., 782 F.2d 1217 (5th Cir. 1985) (stating no supplementary compensation hearing required where material facts regarding late payment were not in dispute, but the legal impact of those facts were in issue).

Since the Court finds no support for the defendant's contention that it was entitled to a hearing after the District Director rendered a final supplemental default order, the Court cannot find that the District Director's failure to grant a hearing was not "in accordance with the law."

III. CONCLUSION

This Court concludes that the procedural steps the District Director took were "in accordance with the law." Since this Court finds that the District Director's actions regarding the supplementary order were lawful, there is no mistake or inadvertence capable of invoking Rule 60(b) relief from judgment. Pursuant to the LHWCA, the district court shall "enter judgment for: the amount declared in default by the supplementary order if such supplementary order is in accordance with the law." 33 U.S.C. § 918(a). This Court properly entered judgment granting the plaintiff's supplemental compensation order on June 18, 1996.

For the reasons stated above General Dynamics's Motion for Relief from Judgment **(document #14)** is **DENIED.**

It is so ordered.

Dated at Hartford, Connecticut, this 24th of December, 1996.

Dominic J. Squatrito
United States District Judge

APPENDIX F.

UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

MANUEL BURGO,	:	
Plaintiff,	:	
	:	CIVIL NO.3:95MC122 (DJS)
v.	:	
	:	
GENERAL DYNAMICS,	:	
CORP.	:	
Defendant.	:	

ORDER

Because the Plaintiff's compensation award is pending before the United States Court of Appeals for the Second Circuit, this Court DENIES WITHOUT PREJUDICE Plaintiff's motion for the award of attorney's fees and expenses (**Doc. No. 19**). Attorney's fees may be awarded under 33 U.S.C. §928(a), only after a compensation award becomes final, and not while the appeal of such award is pending. *See Eifler v. Peabody Coal Co.*, 13 F.3d 236 (7th Cir. 1993); *Thompson v. Potashnick Constr.* Co., 812 F.2d 574 (9th Cir. 1987); *Wells v. Int'l Great Lakes Shipping Co.*, 693 F.2d 663 (7th Cir. 1982).

Furthermore, because the plaintiff seeks to recover fees for services rendered before the administrative court and not this Court, this Court defers to the order of the Benefits Review Board,

reducing the allowable hourly rate from $200, to $150. *See Eifler*, 13 F.3d at 238.

SO ORDERED. Dated at Hartford, Connecticut, this 21st day of March, 1997

DOMINIC J. SQUATRITO
UNITED STATES DISTRICT JUDGE

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 1543—August Term, 1996

(Argued May 13, 1997 Decided August 27, 1997)

Docket No. 96-7832

MANUEL BURGO, JR.,

Plaintiff-Appellee,

—v.—

GENERAL DYNAMICS CORPORATION,

Defendant-Appellant.

Before:

WINTER, *Chief Judge*, CARDAMONE, *Circuit Judge*, and HAIGHT,* *District Judge*.

Defendant General Dynamics Corporation appeals from a June 17, 1996 judgment of the United States District Court

* Hon. Charles S. Haight, Jr., Senior Judge, United States District Court for the Southern District of New York, sitting by designation.

for the District of Connecticut (Squatrito, J.) awarding plaintiff Manuel Burgo $28,000 in penalties under a supplemental compensation order issued pursuant to the Longshore and Harbor Workers' Compensation Act, 33 U.S.C. § 901 *et seq.*

Affirmed.

BOOTH M. KELLY, JR., New London, Connecticut (John W. Greiner, Murphy & Beane, New London, Connecticut, of counsel and on the brief), *for Defendant-Appellant.*

WILLIAM N. BATTY, JR., Boston, Massachusetts (Steven B. Stein, Batty & Stein, Boston, Massachusetts, of counsel and on the brief), *for Plaintiff-Appellee.*

CARDAMONE, *Circuit Judge*:

Defendant General Dynamics Corporation (defendant or appellant) appeals from a judgment of the United States District Court for the District of Connecticut (Squatrito, J.) awarding plaintiff Manuel Burgo, Jr. a $28,000 penalty payment under a supplemental order issued pursuant to the Longshore and Harbor Workers' Compensation Act, 33 U.S.C. § 901 *et seq.* (LHWCA or Compensation Act). The § 914(f) penalty was incurred when General Dynamics failed to make timely payment of a negotiated settlement of plaintiff's disability claims. *See* 33 U.S.C. § 914(f) (Compensation owed to injured longshoremen must be paid within ten days after it becomes due).

General Dynamics argues on appeal that the District Director of the Compensation Act erroneously failed to apply Rule 6(a) of the Federal Rules of Civil Procedure in calculating the ten-day period within which payment of the compensation award was due. When computing the time within which acts governed by the Federal Rules of Civil Procedure must be performed, intermediate Saturdays, Sundays and legal holidays shall not be counted if the period of time is less than 11 days. Fed. R. Civ. P. 6(a).

Does ten days in § 914(f) mean ten business days as in the federal rules or ten calendar days? We think Congress meant ten calendar days, and although sympathetic to equitable complaints of good faith by an employer, we can find no escape from the statutory language.

BACKGROUND

In late summer 1994 plaintiff Manuel Burgo and his employer, defendant General Dynamics, negotiated a settlement of various pending disability claims filed by Burgo with the United States Department of Labor. Burgo had been seeking compensation pursuant to the Longshore and Harbor Workers' Compensation Act for injuries sustained in the course of his employment. The settlement, which consisted of a lump sum payment of $140,000, was approved on August 31, 1994 in an order (compensation order or order) issued by an administrative law judge. The District Director of the Compensation Act filed the compensation order on September 13, 1994. General Dynamics received a copy of the filed order on September 16, 1994 and mailed a check for the full settlement amount three days later. Burgo's attorney received the check on Monday, September 26, 1994—13 days after the order was filed.

On October 31, 1994 Burgo sought a supplemental compensation order for an additional payment of $28,000—20 percent of the settlement amount—on the ground that General Dynamics had failed to deliver the check within ten days of the filing of the compensation order, as required under § 14(f) of the Compensation Act, codified as 33 U.S.C. § 914(f). The Director granted Burgo's request and issued a supplemental compensation order on November 17, 1994. General Dynamics subsequently filed a motion for reconsideration and requested a hearing, maintaining that in calculating the ten day payment period the Director had failed to comply with the time computation provisions of Fed. R. Civ. P. 6(a). The Director denied defendant's motion and declined to hold a hearing. The company subsequently filed an appeal with the Benefits Review Board, which held that it did not have jurisdiction to hear it.

On March 29, 1995 Burgo filed suit in the District of Connecticut to enforce the supplemental compensation order. The district court dismissed the original complaint as defective on its face, but later entered a judgment in plaintiff's favor on an amended complaint. Two days later, on June 20, 1996, the district court filed a clarification of judgment *nunc pro tunc*. It subsequently denied defendant's motion for relief from the judgment made pursuant to Fed. R. Civ. P. 60(b).

DISCUSSION

I Penalties under § 914(f)

Section 914(f) provides in part that "[i]f any compensation, payable under the terms of an award, is not paid within ten days after it becomes due, there shall be added to such unpaid compensation an amount equal to 20 per centum thereof, which shall be paid at the same time as, but in addi-

tion to, such compensation." 33 U.S.C. § 914(f). The parties agree that payment of the negotiated settlement amount became due on September 13, 1994 when the Director filed the compensation order approving the settlement. *See Twine v. Locke*, 68 F.2d 712, 714 (2d Cir. 1934) ("[S]ection 14(f) imposes a penalty for ten days' delay in payment according to the terms of a compensation order which has been duly filed and served . . . ."). Compensation is deemed paid when the claimant receives it, not when the employer places a check in the mail. *See Sea-Land Serv., Inc. v. Barry*, 41 F.3d 903, 909 (3d Cir. 1994).

It is undisputed that although General Dynamics mailed the settlement check within the ten-day period, Burgo did not actually receive the $140,000 payment until September 26—13 days after the compensation order was filed. From these uncontroverted facts it appears that appellant is clearly subject to a § 914(f) penalty. The employer nonetheless insists that the ten-day payment period specified in the statute should be read as ten business days, not ten calendar days.

Analysis of the proper interpretation of a statute must begin with the language of the statute itself. *See Consumer Prod. Safety Comm'n v. GTE Sylvania, Inc.*, 447 U.S. 102, 108 (1980). If the language adopted by Congress is unambiguous, we need not resort to extrinsic sources to further illuminate its meaning. *United States v. Piervinanzi*, 23 F.3d 670, 677 (2d Cir. 1994). Moreover, unless otherwise defined, individual statutory words are assumed to carry their "ordinary, contemporary, common meaning." *Perrin v. United States*, 444 U.S. 37, 42 (1979); *Union Pacific R.R. Co. v. Hall*, 91 U.S. 343, 347 (1875) ("Congress may well be supposed to have used language in accordance with the common understanding.").

A day is the period of time during which the earth makes one revolution on its axis, the average length of this interval

being 24 hours. *Merriam-Webster's Collegiate Dictionary* 294 (10th ed. 1997). We have little difficulty in concluding that ten days is an unambiguous phrase whose ordinary, common meaning is ten consecutive 24-hour periods. *See Reid v. Universal Maritime Serv. Corp.*, 41 F.3d 200, 201 (4th Cir. 1994). Had Congress intended to exclude weekends and holidays, it could readily have specified that payment must be made within ten business days. While, as appellant notes, Congress might also have made its intent more clear by declaring the § 914(f) penalty due after ten calendar days, the modifier "calendar" is employed primarily to distinguish calendar days from business days when both phrases are used. Because the most natural interpretation of the bare phrase ten days is clearly ten calendar days, we will not find an ambiguity in the legislative language simply because Congress could have reinforced its meaning with the use of additional language.

Having determined that the challenged statute is unambiguous and therefore enforceable according to its plain meaning, our inquiry would ordinarily be at an end. Appellant contends, however, that the time computation provisions of Fed. R. Civ. P. 6(a), which require exclusion of weekends and holidays from the calculation of time periods of less than 11 days, overrides the plain language of § 914(f).

A. *Applicability of Rule 6(a)*

Rule 6(a) provides in part that "[i]n computing any period of time prescribed or allowed by these rules, . . . or by any applicable statute, . . . [if] the period of time prescribed or allowed is less than 11 days, intermediate Saturdays, Sundays, and legal holidays shall be excluded in the computation" (the Intermediate Day exclusion). Fed. R. Civ. P. 6(a). Rule 81(a)(6) further specifies that the Federal Rules of Civil Procedure "apply to proceedings for enforcement or review

of compensation orders under [33 U.S.C. §§ 918, 921] except to the extent that matters of procedure are provided for in [the LHWCA]." Fed. R. Civ. P. 81(a)(6). General Dynamics contends that because the Compensation Act itself contains no provision governing the computation of time, Rule 6(a) must apply through Rule 81(a)(6).

The interpretive maxim *expressio unius est exclusio alterius* would suggest that the express inclusion of only §§ 918 and 921 in Rule 81(a)(6) should be construed as the deliberate exclusion of all other sections of the Compensation Act. Moreover, Rule 81(a)(6) is limited on its face to "*proceedings* for enforcement or review of compensation orders" under the named sections. Fed. R. Civ. P. 81(a)(6) (emphasis added). As § 921(e) expressly states, compensation order proceedings are governed exclusively by §§ 918 and 921, the sections specifically incorporated in Rule 81(a)(6). 33 U.S.C. § 921(e) ("Proceedings for . . . enforcing a compensation order . . . shall not be instituted otherwise than as provided in this section and section 918 of this title.").

Section 914(f) simply sets forth the circumstances under which a penalty is due, it does not purport to outline the procedure through which a claimant must go to recover such a penalty. Accordingly, the calculation of a payment deadline under § 914(f) cannot reasonably be characterized as an enforcement proceeding to which the Federal Rules of Civil Procedure apply. *See Reid*, 41 F.3d at 202 (holding that § 914(f) penalty is substantive penalty enforced through procedure governed by § 918). *But see Quave v. Progress Marine*, 912 F.2d 798, 800 (5th Cir. 1990), *cert. denied*, 500 U.S. 916 (1991) (holding that a penalty assessment under § 914(f) of the LHWCA is a "supplementary order declaring the amount of the default" within the meaning of § 918(a) and hence governed by Rule 6(a)).

B. *Notice 42*

Alternatively, appellant argues that the Department of Labor's Office of Workers' Compensation Programs has adopted the time computation provisions of Rule 6(a) in its Notice No. 42 (Notice 42), which relates to the penalty provisions of § 914(f) of the LHWCA. Notice 42, which was issued June 9, 1980 and is still in effect, provides that

> [i]f the tenth day [after payment of compensation becomes due] is a Saturday, Sunday or legal holiday, compensation is due on the first business day following that date. This is in accordance with Rule 6(a) of the Federal Rules of Civil Procedure.

Although Notice 42 does not directly apply because the last day of the ten-day period was a Friday, neither a weekend day nor a holiday, General Dynamics urges us to find that this language manifests the Department of Labor's acceptance of the general applicability of Rule 6(a) in its entirety to calculation of the § 914(f) ten-day time period.

We are unable to accept General Dynamics' Notice 42 argument. Notice 42 expressly adopts only a part of Rule 6(a), *i.e.*, the provision that when the last day of a relevant time period would otherwise fall on a weekend or holiday, the following Monday is to be substituted as the last day of that period (the Terminal Day provision). Notably absent is any reference to the Intermediate Day exclusion at issue in this case. Although we might ordinarily infer that had the Department of Labor intended both the Intermediate Day exclusion *and* the Terminal Day provision to apply to § 914(f) it would have said so explicitly, the timing of Notice 42 renders its significance considerably less certain.

In June 1980 when Notice 42 was promulgated the weekend/holiday exclusion provision of Rule 6(a) applied only to the computation of time periods of less than seven days.

Because the penalty period under § 914(f) is ten days, there would have been no reason for the Department's Office of Workers' Compensation Programs to express any opinion, favorable or otherwise, regarding the applicability of the Intermediate Day exclusion. Appellant declares that we should assume the Labor Department would have adopted the Intermediate Day exclusion if it had been applicable, and that Notice 42 should therefore be read as a ratification of the general proposition that Rule 6(a) governs time calculations under § 914(f).

This point is less than persuasive since the Intermediate Day exclusion was amended in 1985 to apply to periods less than 11 days. In the years following this amendment, the Office of Workers' Compensation Programs has issued no further directives regarding the applicability of Rule 6(a). The Office's 12-year silence on the issue might more reasonably be viewed as an expression of its intent that only those provisions of Rule 6(a) already specifically approved in Notice 42 should apply to § 914(f). As a consequence, we think Notice 42 inconclusive.

Hence, neither Rule 81(a)(6) nor Notice 42 gives us substantial cause to depart from our initial construction of the plain language of the statute. It would be speculative to assume that the Department of Labor intended all of Rule 6(a) to apply simply because it expressly adopted a portion of that rule. In fact, the existence of Notice 42 indicates that the Office of Workers' Compensation Programs did not believe that Rule 6(a) applied to § 914, absent express approval on its part. Similarly, the specific language of Rule 81(a)(6) seems to rule out application of Rule 6(a), rather than argue for it.

In short, defendant has presented no compelling reason for departing from the general rule that the legislature must be presumed to say what it means and mean what it says. Ten days means ten days unless Congress uses some language to

indicate it means "ten days more or less." Although this result may seem harsh in the instant case, where payment was only three days late, the bright line rule we follow is consistent with the Compensation Act's underlying purpose of providing for the prompt payment and enforcement of disability compensation awards. *See, e.g., Tidelands Marine Serv. v. Patterson*, 719 F.2d 126, 129 (5th Cir. 1983) ("[§ 918 procedures] provide[ ] a quick and inexpensive mechanism for the prompt enforcement of unpaid compensation awards, a theme central to the spirit, intent, and purposes of the LHWCA."). The award of the penalty payment should therefore be affirmed.

II Attorney's Fees, Costs and Interests

Burgo's amended complaint included a prayer for additional relief in the form of attorney's fees, costs, and interest on the § 914 penalty. Those claims were effectively denied by the district court when it failed to address them in the judgment and clarification *nunc pro tunc*. Plaintiff renews his request for interest, attorney's fees, and costs on appeal, although he did not file a cross-appeal.

Generally, "[w]ithout a cross-appeal, an appellee may urge in support of a decree any matter appearing in the record," even if the relief sought is based on grounds ignored by the lower court. *Morley Constr. Co. v. Maryland Casualty Co.*, 300 U.S. 185, 191 (1937) (Cardozo, J.). What a party may not do, absent a cross-appeal, is "attack the decree with a view either to enlarging his own rights thereunder or of lessening the rights of his adversary, whether what he seeks is to correct an error or to supplement the decree with respect to a matter not dealt with below." *Id.* Although this rule is now viewed as one of practice rather than of jurisdiction, and may therefore in certain circumstances be disregarded, *see Finkielstain v. Seidel*, 857 F.2d 893, 895 (2d Cir. 1988),

plaintiff offers no justification for us to disregard the rule in this case. For that reason, we decline to award fees, costs and interest.

The lack of a cross-appeal from the district court's implied denial of fees and costs does not bar Burgo from requesting fees for defending this appeal. Burgo bases his request for fees and costs on 33 U.S.C. § 928, which provides:

> If the employer or carrier declines to pay any compensation on or before the thirtieth day after receiving written notice of a claim for compensation . . . on the ground that there is no liability for compensation . . . and the person seeking benefits shall thereafter [use] the services of an attorney . . . in the successful prosecution of his claim, there shall be awarded . . . a reasonable attorney's fee. . . .

33 U.S.C. § 928(a). This statutory authorization of attorney's fees expressly applies only to the successful prosecution of a claim for compensation, and not for collection of a penalty. The parties agree that appellee received his $140,000 compensation award 13 days after the compensation order was filed, and that the only issue on this appeal is the § 914 penalty for late payment of that compensation.

The language of § 914 supports the common sense conclusion that payments under this section are properly characterized as penalties, and are distinguishable from compensation. For example, § 914(f) states that if due, "there shall be added to such unpaid compensation an amount equal to 20 per centum thereof, which shall be paid . . . in addition to [ ] such compensation." The statutory language thus clearly differentiates compensation from the § 914(f) penalty payment. Were it otherwise, § 914 would allow plaintiff to collect a 20 percent premium for the late payment of an already-assessed § 914 penalty, and every late payment would

lead to another 20 percent premium. We do not think Congress intended the § 914 penalty to become a form of compound interest. *Cf. Strachan Shipping Co. v. Wedemeyer*, 452 F.2d 1225, 1228 (5th Cir. 1971) ("The[ ] 10 per cent and 20 per cent additions [under §§ 914(e)-(f)] . . . bear little resemblance to interest, and should rather be treated as penalties."). Section 928(a), which allows for an award of attorney's fees only if the employer "declines to pay any compensation," does not authorize an award of fees where the employer contests a § 914(f) penalty payment. As a consequence, plaintiff's petition for attorney's fees, costs and interest is denied.

CONCLUSION

For the foregoing reasons, the judgment of the district court is affirmed without costs, fees or interest.

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UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 1543—August Term, 1996

Petition for Rehearing Filed: September 10, 1997
Decided: November 17, 1997)

Docket No. 96-7832

MANUEL BURGO, JR.,

Plaintiff-Appellee,

—v.—

GENERAL DYNAMICS CORPORATION,

Defendant-Appellant.

Before:

WINTER, *Chief Judge*, CARDAMONE, *Circuit Judge*, and HAIGHT,* *District Judge*.

Petition for rehearing of this Court's August 27, 1997 opinion, 122 F.3d 140 (2d Cir. 1997), inasmuch as it held that

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* Hon. Charles S. Haight, Jr., Senior Judge, United States District Court for the Southern District of New York, sitting by designation.

plaintiff-appellee Manuel Burgo was not entitled to attorney's fees, costs, and interest on the 33 U.S.C. § 914(f) penalty.

Petition denied.

WILLIAM N. BATTY, JR., Steven B. Stein, Batty & Stein, Boston, Massachusetts; Joseph M. Fisher, Hingham, Massachusetts, of counsel, *on the petition for rehearing brief filed for Plaintiff-Appellee.*

BOOTH M. KELLY, JR., Murphy & Beane, New London, Connecticut, *on the petition for rehearing brief filed for Defendant-Appellant.*

PER CURIAM:

Following our August 27, 1997 decision in this case, *Burgo v. General Dynamics Corp.*, 122 F.3d 140 (2d Cir. 1997), familiarity with which is assumed, plaintiff-appellee Manuel Burgo petitioned for rehearing with respect to our determination that he was not entitled to attorney's fees, costs, and interest on the 33 U.S.C. § 914(f) penalty imposed upon General Dynamics when it failed to make timely payment of a negotiated settlement of Burgo's disability claims. Defendant-appellant General Dynamics also petitioned for rehearing with respect to our determination that Fed. R. Civ. P. 6(a) does not apply to the calculation of the 10-day time period specified in § 914(f).

Burgo argues that our denial of the fees was based on a mistaken belief that the district court had denied his claims regarding the additional relief. He maintains that, in fact, the district court denied his motion for fees and expenses "without prejudice" because such a request could not be decided while the appeal of the § 914(f) award was pending, and that issue, therefore, could not be the subject of an appeal. Burgo urges that our previous determination of the fees issue be withdrawn as advisory. Although we decline to withdraw our earlier opinion, we write to clarify it.

The only issue that we reached and decided was Burgo's request for fees, costs and interest with regard to the appeal. That issue was properly before us and although our resolution of this issue may have important precedential consequences for Burgo, such consequences do not render our opinion advisory. In addition, our denial of petitioner's request for § 928 relief was not in error. As we stated in our August 27, 1997 opinion, § 928's authorization of attorney's fees applies only to the successful prosecution of a "claim for compensation," and does not authorize this kind of relief when a plaintiff seeks and recovers a § 914(f) penalty, which was the relief Burgo obtained. In short, petitioner is not entitled to fees, costs and interest upon being awarded a penalty.

General Dynamics raises in its petition for rehearing essentially the same arguments with respect to Rule 6(a) it made on appeal. Those arguments were fully analyzed and resolved in our August 27, 1997 opinion and we adhere to the resolution we made there.

Both petitions for rehearing are, accordingly, hereby denied.

APPENDIX I.

IN THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 85-5213

EDGAR T. HISLE,	:	
Plaintiff-Appellee,	:	On Appeal from the United States District
vs.	:	Court for the Western District of Kentucky
LOUISIANA DOCK COMPANY,	:	
Defendant-Appellant.	:	

BEFORE: KRUPANSKY AND GUY, Circuit Judges; and HOLSCHUH, District Judge.*

PER CURIAM.

The issue presented by this appeal from the district court's enforcement of an award made under the Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C. § 901 et seq., is whether the Act violates an employer's due process rights by requiring employers to pay compensation awards pending appeal and by imposing a substantial penalty when payment is not timely made.

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* Honorable John D. Holschuh, United States District Judge for the Southern District of Ohio, sitting by designation.

Plaintiff Edgar Hisle filed a claim for compensation pursuant to the Longshoremen's and Harbor Workers' Compensation Act ("the Act"), alleging that he had injured his back while engaged in the performance of his duties. On August 7, 1984 an Administrative Law Judge ordered defendant Louisiana Dock Company to pay plaintiff lost wages, past and future medical expenses related to his back injury, interest, attorney's fees, and a fine. Defendant petitioned the Benefits Review Board for review of the ALJ's decision and moved for an order staying payment of the award pending review. The Board denied defendant's motion for a stay but agreed to hear the appeal, which remains pending.

When defendant did not pay the amounts awarded, plaintiff requested a supplementary compensation award. On December 17, 1984, the United States Department of Labor Office of Workers' Compensation Programs, Sixth District (OWCP) found defendant in default for the sum of $46,519.55. Pursuant to section 14(f) of the Act, the OWCP awarded plaintiff an additional sum of $9,303.91.[1] Defendant was ordered to pay plaintiff a total of $55,823.46, plus interest.

Plaintiff filed the supplementary compensation order in the district court, seeking enforcement of the OWCP's order. On January 18, 1985 the courts entered judgment on the

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[1] 33 U.S.C. § 914 (f) provides:

> If any compensation, payable under the terms of an award, is not paid within ten days after it becomes due, there shall be added to such unpaid compensation an amount equal to 20 per centum thereof, which shall be paid at the same time as, but in addition to, such compensation, unless review of the compensation order making such award is had as provided in section 921 of this title and an order staying payment has been issued by the Board or court.

supplementary compensation order.[2] The court vacated its judgment on February 12, 1985 however, having decided that such decision was improvident, the court later reinstated the judgment. Subsequent to filing a notice of appeal, defendant posted a supercedeas bond and the district court stayed enforcement of its judgment pending appeal to this Court. On April 19, 1985 this Court set aside the stay of execution, concluding that the district court lacked authority to issue the stay absent irreparable harm to the employer. The matter is now before the Court for disposition on the merits of the appeal from the judgment of the district court.

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[2] 33 U.S.C § 918(a) provides in relevant part:

> In case of default by the employer in the payment of compensation due under any award of compensation for a period of thirty days after the compensation is due and payable, the person to whom such compensation is payable may, within one year after such default, make application to the deputy commissioner making the compensation order or a supplementary order declaring the amount of the default. After investigation, notice, and hearing, as provided in section 919 of this title, the duputy commissioner shall make a supplementary order, declaring the amount of the default, which shall be filed in the same manner as the compensation order. In case the payment in default is an installment of the award, the deputy commissioner may, in his descretion, declare the whole of the award as the amount in default. The applicant may file a certified copy of such supplementary order with the clerk of the Federal district court for the judicial district in which the employer has his principal place of business or maintains an office, or for the judicial district in which the injury occurred...Such supplementary order of the deputy commissioer shall be final, and the court shall upon the filing of the copy enter judgment for the amount declared in default by the supplementary order if such supplementary order is in accordance with law. Review of the judgment so entered may be had as in civil suits for damages at common law...

I.

The Longshoreman's Act provides a comprehensive scheme governing the rights of a longshoreman who sustains a work-related injury. Pallas Shipping Agency Ltd. v. Duris, 461 U.S. 529 (1983). When a claim for injury is made under the Act, the employer must pay compensation to the injured employee within two weeks of learning of his injury, or, if liability is contested, the dispute is resolved through administrative channels. 33 U.S.C. § 914. If the dispute cannot be resolved informally, the claim proceeds to a formal hearing before an ALJ. 33 U.S.C. § 919. The ALJ's final compensation order may be appealed to the Benefits Review Board. 33 U.S.C. § 921(b) (3). An Adverse decision by the Board is then appealable to the United States Court of Appeals for the circuit in which the injury occurred. 33 U.S.C. § 921 (c).

Defendant challenges the constitutionality of two provisions of the Act as violative of the due process clause of the Fifth Amendment. Those sections provide first, that payment of an ALJ's award cannot be stayed pending appeal unless the employer establishes that irreparable injury would result, [3] and second, that

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[3] 33 U.S.C. § 921 (b) (3) provides:

> The Board shall be authorized to hear and determine appeals raising a substantial question of law or fact taken by any party in interest from decisions with respect to claims of employees under this chapter and the extensions thereof. The Board's orders shall be based upon the hearing record. The findings of fact in the decision under review by the Board shall be conclusive if supported by substanital evidence in the record considered as a whole. The payment of the amounts required by an award shall not be stayed pending final decision in any such proceeding unless ordered by the Board. No stay shall

in the event payment is not timely made, a substantial penalty of twenty percent of the original compensation award may be assessed against the employer. [4] It is defendant's position that the statutory requirement that the employer pay benefits and penalties pending appeal, when the practical likelihood of recovery of those payments in the event of reversal is minimal, deprives employers of property without due process of law because it renders the appellate process meaningless.

The due process clause of the Fifth Amendment is intended to protect against arbitrary deprivations of liberty or property by the federal government. When deprivation of a liberty or property interest is threatened, what process is due depends upon: (a) the private interest affected by government action; (b) the risk of erroneous deprivation and the value of additional safeguards ; and (c) the governmental interest, including the importance of the function and fiscal and administrative burdens. Mathews v. Eldridge, 424 U.S. 319, 335 (1976); Fleming v. United States Dept. of Agriculture, 713 F.2d 179, 183 (6th Cir. 1983). The primary consideration in any procedural due process case is whether the individual has been given an opportunity to be heard at a meaningful time and in a meaningful manner. Mathews, 424 U.S. at 333. Fundamental to this concept is that the administrative process be accurate and provide a fair consideration of the case. Fleming, 713 F.2d at 183.

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be issued unless irreparable injury would othervise ensue to the employer or carrier.

The same standard is applicable to a request for a a stay at the circuit court level. 33 U.S.C. § 921 (c) .

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[4] See supra n. 1.

In the present case, the challenged governmental action impinges upon a property interest--the payment by employers of compensation to injured employees. To protect against erroneous deprivation, prior to the time that an employer is required to make any payment to the injured employee, if liability is contested, an impartial ALJ determines the substantive rights of the parties after conducting a formal adversarial hearing. The hearing is conducted in accordance with the Administrative Procedure Act, 5 U.S.C. § 554, which provides for presentation of evidence and cross-examination of witnesses. In the event that a party is not satisfied with the outcome of the hearing, the merits of the decision are appealable to the Benefits Review Board in the first instance and ultimately to the Court of Appeals. When an application for a supplementary compensation award due to default is made to the Deputy Commissioner, the Commissioner must investigate the application, provide ten days notice to interested parties, and provide a formal hearing if so requested. 33 U.S.C. 1 918 (a), §919

The Longshoremen's Act was enacted in 1927 to ensure that every person engaged in maritime employment received workers' compensation coverage. Home Indemnity Co. v. Stillwell, 597 F.2d 87, 88 (6th Cir.), cert. denied, 444 U.S. 869 (1979). The Act includes a compromise common in workers' compensation legislation--it guarantees injured employees the right to receive immediate, fixed benefits regardless of fault and without lengthy litigation, but also precludes them from later filing other types of legal actions against their employers. See Lockheed Aircraft Corp. v. United States, 460 U.S. 190, 194 (1983). More importantly, the Act strikes a balance between the competing interests of disabled laborers and their employers.

> The LHWCA, like other workmen's compensation legislation, is indeed remedial in that it was intended to provide a certain recovery for employees who are injured on the job. It imposes

> liability without fault and precludes the assertion of various common-law defenses that had frequently resulted in the denial of any recovery for disabled laborers. While providing employees with the benefit of a more certain recovery for work-related harms, statutes of this kind do not purport to provide complete compensation for the wage earner's economic loss. On the contrary, they provide employers with definite and lower limits on potential liability than would have been applicable in common-law tort actions for damages... The use of a schedule of fixed benefits as an exclusive remedy in certain cases in consistent with the employees' interest in receiving a prompt and certain recovery for their industrial injuries as well as with the employers' interest in having their contingent liabilities identified as precisely and as early as possible.

Potomac Electric Power Co. v. Director OWCP, 449 U.S. 268, 281-82 (1980) (footnote omitted). Thus, the Act not only provides for the financial needs of injured employees and their families, it also serves to strengthen the employers' incentive to promote on-the-job safety. H.R. Rep. No. 92-1441, 92d Cong., 2d Sess., reprinted in 1972 U.S. Code Cong. & Ad. News 4698, 4699.

The legislative history of the challenged stay provisions could not be clearer. The Act is expressly designed to provide for prompt payment of compensation orders notwithstanding subsequent appeals by the employer. Providence Washington Ins. Co. v. Director OWCP, 765 F.2d 1381, 1384 (9th Cir. 1985). The House report on the amendments to the Act which established the Benefits Review Board is unequivocal:

> The Committee does not intend that the appellate process result in delay of payment of compensation. Initial awards are not to be stayed pending review proceedings except by specific order of the board or the court based on a finding that irreparable injury would otherwise result to the employer.

H.R. Rep. 92-1441, supra at 4710. This language clearly represents a legislative determination that "except in extreme circumstances of irreparable injury to the payer it is preferable that an injured worker receive regular compensation, even [compensation which is] later determined to have been wrongly exacted and not recoverable by the payer, than that [an injured worker] be left without assistance until all amounts are finally determined. " Henry v. Gentry Plumbing & Heating Co., 704 F.2d 863,865 (5th Cir. 1983). That section of the Act which adds a substantial penalty for failure to timely pay is designed to further encourage prompt payment so that injured workers will not be left without medical expenses or a means of support. Providence Washington Ins. Co., 765 F. 2d at 1386; Garvey Grain Co. v. Director, OWCP, 639 F.d 366, 372 (7th Cir. 1981). [5]

In light of the procedural safeguards provided by the Act and the substantial governmental interest, expressed by congress in assuring injured workers prompt payment of benefits under the Act, the Court finds that the provisions which preclude a stay of

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> Defendant argues that the Supreme Court's decision in Jackson v. Lyles Brothers Steamship Co., 386 U.S. 731 (1967), holding that an injured employee could sue a shipowner for unseaworthiness, compromises the theory that employees need immediate payment since the Act is no longer the employee's exclusive remedy for injury. Since the amendment to the Act forbidding stays of payment was encated five years after the Jackson decision, this argument is without merit.

payment pending appeal, absent irreparable harm, and which provide for a substantial penalty in the event payment is not timely made, do not deny employers due process of law. See Garvey Grain Co., 639 F. 2d at 372; Hardaway Contracting Co. v. O'Keeffe, 414 F. 2d 657, 661 (5th Cir. 1968); Geary v. Jeffboat, Inc., 620 F. Supp. 41, 42 (S.D. Ind. 1985).

II.

Approximately one month prior to argument in this case, plaintiff filed a motion with the Court for an award of attorney's fees. Although entitled "motion for award of attorney's fee," the motion is twofold, first it seeks review by this Court of the district court's July 10, 1985 denial of attorney's fees for counsel's work before that court, and second, it requests this Court to award attorney's fees for work performed by counsel "for all services rendered and to be performed before the District Court and this Court until this case is concluded."

Plaintiff's motion, insofar as it seeks review of the district court's denial of attorney's fees, is not properly before the Court. The district court's denial of attorney's fees for work performed before that court was a collateral appealable order. See Memphis Sheraton Corp. v. Kirkley, 614 F. 2d 131,133 (6th Cir. 1980). Since plaintiff failed to timely file a separate notice of appeal of that order, this Court is without jurisdiction to consider whether the district court properly ruled on that motion. There remains, however, the question whether plaintiff is entitled to attorney's fees for work performed in the appellate court as a result of this appeal by the employer of the district court's judgment on the supplementary compensation order.

Defendant argues that the Longshoremen's Act does not entitle plaintiff to an award of attorney's fees in an action brought pursuant to section 918 (a) to enforce a supplementary compensation order. The Court believes that the provisions of the

Longshoremen's Act should not be so narrowly construed. Section 928 (a) of the Act, which provides for the award of a claimant's attorney's fees in certain circumstances, provedes irrelevant part:

> If the employer or carrier declines to pay any compensation…on the ground that there is no liability for compensation within the provisions of this chapter, and the person seeking benefits shall thereafter have utilized the services of an attorney at law in the successful prosecution of his claim, there shall be awarded… a reasonable attorney's fee against the employer or carrier in an amount approved by the deputy commissioner, Board, or court, as the case may be, which shall be paid directly by the employer or carrier to the attorney for the claimant in a lump sum after the compensation order becomes final.

In applying the foregoing statute to this case, the Court's view is that plaintiff is entitled to an award of a reasonable attorney's fee for counsel's work in this Court. Defendant employer in this case not only declined to pay the original compensation award, it also declined to comply with the supplementary compensation order awarding plaintiff additional benefits. Plaintiff secured the services of counsel for the purposes of filing the supplementary compensation order in district court and obtaining a judgment for the amounts due and owing. When the district court entered judgment in accordance with section 918 (a), the employer appealed the decision to this Court, causing plaintiff to incur added legal expense. Plaintiff's claim that he is entitled to judgement on the supplementary compensation order has been successfully prosecuted. Accordingly, plaintiff is entitled to recover attorney's fees generated in the appeal to this Court

when the compensation order becomes final. See Zeller v. Associated Indemnity Corp., 92 F. 2d 453, 454 (9th Cir. 1937).

Defendant relies upon a provision of section 918(a) stating that "[r]eview of the [district court's] judgment so entered may be had as in civil suits for damages at common law" in support of its contention that recovery of attorney's fees is precluded in section 918 proceedings. The Court is not persuaded by this argument. The "civil suits" language in section 918(a) merely provides that judgments on supplementary compensation orders are appealable in the same manner as any judgment for damages in any civil action at common law. It assures the right of appeal from such judgments and provides that such appeals will be governed by the same procedures as are applicable to other civil actions. The statute neither states not implies that attorney's fees cannot be awarded in section 918 actions. Moreover, defendant's interpretation of the statute is contradicted by the language of section 928 itself, which states that "if any proceedings are had before the Board or any court for review of any action, award, order, or decision," attorney's fees may be awarded by the appropriate reviewing body. 33 U.S.C. § 928 (c) (emphasis added).

The legislative history of section 928 indicates that the statute is designed to ensure that injured employees will recover the full amount contemplated by the Act and that the cost of legal services will not diminish the benefits recovered. It is also a clear expression of Congressional intent that employers should pay legitimate claims made by injured employees without lengthy and burdensome litigation. Oilfield Safety & Machine Specialties, Inc. v. Harman Unlimited, Inc., 625 F. 2d 1248, 1257 (5th Cir. 1980). Those legislative objectives are best met by a construction of section 918 which allows for recovery of attorney's fees when claimants are forced to file a lawsuit n order to compel payment of supplementary compensation orders.

Although we have found that plaintiff may recover reasonable attorney's fees incurred as a result of the employer's appeal of the judgment on the supplementary compensation order to this Court, it is clear that plaintiff's pending motion cannot be granted, because it seeks an award of fees "for all services rendered and to be performed before the District Court and this Court until this case is concluded." As noted earlier in this opinion, plaintiff's failure to timely appeal the district court's denial of fees precludes this Court from awarding fees for services performed in that court. With regard to the awarding of fees for services performed in this Court, the motion seeks an order awarding fees "until this case is concluded," which presumably includes not only services preformed in this appeal from the district court's judgment, but also services that may be rendered in any appeal from the final judgment of the Benefits Review Board. Because this Court will not approve the payment of attorney's fees for services that may be rendered in the future, plaintiff's pending motion must be denied.

For the reasons stated above, this Court approves the awarding of reasonable attorney's fees for services rendered in this Court in connection with the defendant's appeal from the judgment entered on the supplementary compensation award. However, in view of the fact that the award of such a fee can be made only "after the compensation order becomes final, " 33 U.S. C.§ 928 (a), the denial of plaintiff's pending motion is without prejudice to plaintiff's filing a motion with the Benefits Review Board for the awarding of such a fee it the decision of the ALJ is affirmed by the Board on review. By this procedure, it plaintiff ultimately prevails before the Benefits Review Board on the merits of his claim and the employer appeals that decision to this Court, we will have before us not only the question of whether the Board's decision should be affirmed, but also , if that decision is affirmed by the Court, the reasonableness of attorney's fees for services rendered both in the appeal to the Board and in this Court on the appeal

from the district court's judgment. If, on the other hand, the award of benefits by the ALJ is not affirmed by the Board or, if affirmed , is reversed by this Court, then plaintiff would not by entitled to the award of any attorney's fees in this case.

For the reasons stated herein, the judgnet of the district court is AFFIRMED.

Supreme Court, U.S.
FILED
APR 20 1998
CLERK

No. 97-1344

In The

Supreme Court of the United States

October Term, 1997

MANUEL BURGO, JR.,

Petitioner,

vs.

GENERAL DYNAMICS CORPORATION,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Second Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTION PRESENTED FOR REVIEW

When interest was requested in Petitioner's Amended Complaint but not awarded by the District Court and no cross-appeal filed, did the Second Circuit Court of Appeals correctly determine that the Petitioner was not entitled to interest because of his failure to file cross-appeal.

Was the Second Circuit Court of Appeals correct in determining that payments under 33 U.S.C. § 914(f) are a penalty and not compensation, and therefore did not satisfy the provisions of 33 U.S.C. § 928 for an award of statutory attorney fees and expenses.

RULES 29.6 STATEMENT

Electric Boat Corporation (formerly General Dynamics Corporation Electric Boat Division) is a wholly owned subsidiary of General Dynamics Corporation. General Dynamics Corporation is the publicly traded corporation. Electric Boat Corporation does not issue shares to the public.

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STATEMENT OF THE CASE

The Petitioner, Manuel Burgo, Jr., filed claims with the United States Department of Labor against his employer, General Dynamics (Respondent), for work-related injuries covered under the Longshore and Harbor Workers Compensation Act (LHWCA), 33 U.S.C. § 901, *et seq*. The Petitioner and Respondent reached a lump sum settlement for $140,000 which was approved by Administrative Law Judge David W. DiNardi on August 31, 1994, under 33 U.S.C. § 908(i). The LHWCA District Director formally filed the settlement Order in his office on September 13, 1994. Pursuant to 33 U.S.C. § 914(f), the Respondent must make payment within ten days after becoming due or be penalized an additional twenty percent of the compensation order. The Respondent received the Order on September 16, 1994, and mailed a check to the Petitioner's attorney on September 19, 1994. The Petitioner's attorney received the check on September 26, 1994.

The Petitioner contended that the settlement proceeds were not received within ten days after becoming due, and that he was entitled to an additional twenty percent penalty.

On October 31, 1994, the Petitioner requested the LHWCA District Director to issue a Supplemental Compensation Order awarding the additional $28,000 in penalty. The LHWCA District Director indicated that the Respondent and insurance carrier submitted "information" contesting the Supplemental Compensation Order on the theory that the ten day period provided for in § 914(f) excludes interim weekends and holidays under Fed. R. Civ. P. 6(a). However, neither the Respondent nor insurance carrier requested a hearing on the supplemental compensation claim until after the District Director conclusively ruled that the supplemental compensation was due.

On November 17, 1994, the District Director issued a Supplemental Compensation Order for a Section 14(f) penalty, awarding the Petitioner Supplemental Compensation in the amount of $28,000 on the grounds that the Respondent did not pay the settlement within ten days of it becoming due. (Petitioner's App. 1a).

Counsel for the Respondent filed a motion for reconsideration of the award order on November 23, 1994, contending that the District Director failed to calculate correctly the ten-day payment period under § 914(f), in accordance with Fed. R. Civ. P. 6(a). The Respondent also requested a hearing with the District Director on the issue of a penalty. Although the District Director denied the request for a hearing, he did consider the Respondent's argument. Nonetheless, the District Director denied the reconsideration request on December 5, 1994. The District Director based his decision on the strict interpretation of the language of § 914(f), finding that express statutory provisions prevail over Federal Rules of Civil Procedure 6(a). (Petitioner's App. 8a).

On March 29, 1995, the Petitioner filed a complaint with the United States District Court of Connecticut to enforce the Supplemental Compensation order pursuant to 33 U.S.C. § 914(f) and § 918(a). On January 31, 1996, the District Court found the complaint to be defective on its face. The Petitioner then filed with the District Court an amended petition on June 17, 1996. The amended petition asked for the sum of $28,000 due pursuant to 33 U.S.C. § 914(f), plus interest, costs and attorney's fees, if appropriate. The District Court, without a hearing, entered judgment on the Supplemental Compensation order on June 17, 1996 for $28,000, but not for any interest, costs or attorney's fees. The District Court entered a clarification of judgment *nunc pro tunc* on June 20, 1996 (Petitioner's App. 14a).

Pursuant to 33 U.S.C. § 918(a), Respondent appealed the judgment of the District Court. Petitioner did not file a cross appeal of the denial of interest, costs or attorney's fees.

On September 13, 1996, the Respondent filed a Motion for Relief from Judgment of the supplementary compensation order granted on June 18, 1996, pursuant to Fed. R. Civ. P. 60(b). The Respondent claimed that by reasons of mistake or inadvertence, the District Court's decision was not in accordance with the law. On December 24, 1996, the District Court issued an Order denying the Respondents motion for relief from judgment. (Petitioner's App. 16a).

On August 27, 1997, the United States Court of Appeals for the Second Circuit affirmed the judgment of the District Court, but denied Petitioner's request for attorney's fees, expenses and interest in his successful defense of Respondents' appeal. (App. 27a). The parties filed timely Petitions for Rehearing, which were denied on November 17, 1997. (Petitioner's App. 39a).

SUMMARY OF ARGUMENT

The Petition for a Writ of Certiorari should be denied because it does not allege an important federal question which merits review by the Supreme Court. The questions before this Court do not represent any issues of great public importance as distinguished from that of the parties. The two issues presented by the Petitioner are entitlement to interest and attorney fees.

Initially, the Petitioner requested interest when he was before the District Court. That Court did not award interest. At the time of the decision, the Petitioner did not appeal that to the Second Circuit Court of Appeals. In its order, the Second Circuit held that the issue was not before them, and refused to order

interest, as is correct under well-settled rules of law. As such, there is no ground to grant Certiorari regarding the failure to award interest.

The Petitioner further asserts that he is entitled to attorney fees due to the assignment of the § 914(f) penalty. There is no conflict between the Second Circuit Court's opinion and those of other Circuits on this issue. The Petitioner relies on the Sixth Circuit's opinion in *Hisle v. Louisiana Dock Company*, 798 F.2d 469, 1986 WL 17204 (6th. Cir) which is not similar factually with the decision in this case. In *Hisle*, the employer failed to pay the original compensation order, interest, as well as the § 914(f) penalty. Here, the question is: does the § 914(f) penalty alone satisfy the statutory language of § 928 to allow the imposition of attorney's fees?

Additionally, the published Second Circuit Court of Appeals decision in *Burgo v. General Dynamics*, 122 F.3d 140 (2d Cir. 1997), *reh. den.*, November 17, 1997, should not conflict with the unpublished decision in *Hisle v. Louisiana Dock Company*, 798 F.2d 469, 1986 WL 17204 (6th Cir).

The opinion in *Quave v. Progress Marine*, 918 F.2d 33 (5th Cir. 1990) does not conflict with the Second Circuit's opinion because pre-judgment interest was awarded, but not a § 914(f) penalty. That is the opposite of the situation here, where no interest was awarded, but the § 914(f) penalty was awarded.

There is no conflict with *Sea-Land Service Inc. v. Barry*, 41 F.3d 903 (3rd Cir. 1994) and *Foundation Constructors, Inc. v. Director, OWCP*, 950 F.2d 621 (9th Cir. 1991) because neither case involved the issue of attorney's fees. There is no conflict with *Strachan Shipping Co. v. Wedemeyer*, 452 F.2d 1225 (5th Cir. 1971) as there was no issue of attorney's fees for § 914(f) penalty presented.

The Federal Circuit in *Ingalls Shipbuilding, Inc. v. Dalton*, 119 F.3d 972 (Fed. Cir. 1997) did not uphold an award of interest on the late payment of penalty under 33 U.S.C. § 914(f). The question in *Ingalls* was whether payments under 33 U.S.C. § 914(e) was a penalty under federal procurement regulations. There is no discussion of compensation under 33 U.S.C § 928. Other Courts have held the § 914(e) and § 914(f) are penalties.

REASONS FOR DENYING THE WRIT

I.

THE QUESTION PRESENTED DOES NOT MERIT REVIEW.

The question raised by Petitioner does not merit review, nor does Petitioner articulate any "special and important reasons" to support his argument that this Court should exercise its discretionary power of review. Rule 10 of the Supreme Court of the United States implies that there must be a substantial Federal Question presented to warrant the granting of Certiorari. The question presented by Petitioner relates solely to whether the Second Circuit correctly decided that the Petitioner failed to preserve his right to interest by failing to file a cross appeal and he was not entitled to a statutory award of attorney's fees under § 928 because a § 914(f) penalty is not compensation. Further, the Petitioner only received a Section 914(f) Penalty, which does not by itself merit an award of attorney fees.

The decision of the Second Circuit does not conflict with a decision of this Court or of another Federal Circuit Court of Appeals, nor has the Second Circuit decided a Federal Question in a way which conflicts with a state Court of last resort. There is no evidence that the Second Circuit Court of Appeals has "departed from the accepted and usual course of judicial

proceedings, or sanctioned such a departure by a lower court" so as to warrant an exercise of this Court's power of supervision.

Certiorari should not be granted "except in cases involving principals the settlement of which is of importance to the public, as distinguished from that of the parties", and where "there is a real and embarrassing conflict of opinion and authority between the Circuit Courts of Appeals." *Rice v. Sioux Memorial Park Cemetery,* 349 U.S. 70 (1955). The Petitioner has failed to demonstrate that any of the reasons set fourth above are present in the instant case. Petitioner is merely dissatisfied with the outcome of the decision as it affects him as a litigant and is now attempting to reargue the issue which was not awarded by the District Court and affirmed by the Circuit Court of Appeals.

II.

NO REASON TO GRANT CERTIORARI REGARDING ISSUE OF INTEREST.

In his Amended Petition with the District Court, the Petitioner requested the 20% penalty, plus interest, costs and attorney's fees, if appropriate. The District Court's judgment was for the sum of $28,000 but did not award interest, costs and attorney's fees. The Petitioner did not file a cross-appeal of the denial of his request for interest.

What a party may not do, absent a cross-appeal, is

> attack the decree with a view either to enlarging his own rights thereunder or of lessening the rights of his adversary, whether what he seeks is to correct an error or to supplement the decree with respect to a matter not dealt with below.

Morley Construction Co. v. Maryland Casualty, Co., 300 U.S. 185, 191 (1937) (Cardozo, J.). The Second Circuit saw no reason to excuse the Petitioner's failure to file a cross-appeal and declined to award fees, costs and interest. The Petitioner has offered no case to support his claim. The Respondent contends that this Court should not exercise its discretionary power of review to award him interest in this case.

III.

THERE IS NO CONFLICT BETWEEN THE CIRCUIT COURTS OF APPEAL IN THIS CASE.

Petitioner states the Second Circuit's opinion is in conflict with *Hisle v. Louisiana Dock Company*, *supra*. In *Hisle*, the employer failed to pay the compensation order as well as the § 914(f) penalty. The Sixth Circuit calls the § 914(f) "a substantial penalty of twenty percent of the original compensation award" (Petitioners App. 46a). In the case *sub judice*, the compensation award was paid by the employer. The only issue was the § 914(f) penalty which the Respondent contended was not properly awarded. Both the Second Circuit and the Sixth Circuit call § 914(f) a penalty. The Second Circuit found that a § 914(f) penalty was not compensation under 33 U.S.C. § 928. The Sixth Circuit did not discuss that issue. The employee in *Hisle* was entitled to attorney fees to recover unpaid compensation under the ALJ's order.

The Second Circuit's published decision in *Burgo v. General Dynamics*, 122 F.3d 140 (2d Cir. 1997), *reh. den.*, November 17, 1997 is not in conflict with the unpublished decision in *Hisle v. Louisiana Dock Company*, 798 F.2d 469, 1986 WL 17204 (6th Cir.). The Sixth Circuit did not believe the decision in *Hisle* merited publication. Under the Sixth Circuit's Local Rule 24(c):

> Citation of unpublished decisions by counsel in briefs and oral arguments in this Court and in the District Courts within this Circuit is disfavored, except for the purpose of establishing res judicata, estoppel, or the law of the case.

The precedential value in the Sixth Circuit of the unpublished *Hisle* is questionable and, certainly, does not rise to a conflict of opinions with the published decision in this case.

The Petitioner's belief that there is a conflict in the opinions in *Sea-Land Service Inc. v. Barry*, 41 F. 3d 903 (3rd Cir. 1994) and *Foundation Constructors, Inc. v. Director, OWCP*, 950 F.2d 621 (9th Cir. 1991) is misplaced. Neither case involved the issue of attorney's fees. The claimed conflict of opinions between *Strachan Shipping Co. v. Wedemeyer*, 452 F.2d 1225 (5th Cir. 1971) is also factually incorrect. *Strachan* did not involve the issue of attorney's fees for § 914(f) penalties. The Second Circuit Court quotes *Strachan* to support its interpretation that payments under § 914(f) are a penalty.

The Petitioner's claimed conflict with the Circuit Courts' opinion in *Ingalls Shipbuilding Inc. v. Dalton*, 119 F.3d 972 (Fed. Cir. 1997) is also incorrect. The Federal Circuit did not uphold an award of interest on the late payment of a penalty under § 914(f). The issue in *Ingalls op cite* was whether payments made under 33 U.S.C. § 914(e) were penalties under federal procurement regulations. There was no discussion whether the § 914(f) penalty was compensation under the language of 33 U.S.C. § 928. As such, that case does not apply to the instant case.

IV.

OTHER COURTS' OPINIONS SUPPORT THE SECOND CIRCUIT'S OPINION THAT SECTION 914(e) AND 914(f) PAYMENTS ARE PENALTIES.

This Court in *Pallas Shipping Agency Ltd. v. Duris*, 461 U.S. 529, 534 (1983) refers to both § 914(e) and § 914(f) as penalties. *Ingalls Shipbuilding v. Director* (*Ingalls I*), 898 F.2d 1088, 1095 (5th Cir. 1990) stated

> *III Penalties*
> Section 914(e) of the Act provides that employers are liable for a ten percent penalty for failure to pay a compensation award when due, unless they timely file a notice of controversion or are excused.

See also Ingalls Shipbuilding v. Dir. (Ingalls II), 976 F.2d 934, 938 (5th Cir. 1991); *Newport News Shipbuilding and Dry Dock Co v. Director, OWCP*, 594 F.2d 986, 987 (4th Cir. 1979); *National Steel and Shipbuilding Co v. Bonner*, 600 F.2d 1288, 1294 (9th Cir. 1979); *Strachan Shipping Co v. Wedemeyer*, *supra* at 1228.

Where the language of § 914(f) provides for a 20% payment in addition to the original compensation order, if the payment is only one day late it is not related to compensating the employee for delay or loss of use of wages. Section 914(f) does not distinguish between a payment one day late or one year late; it is still 20% of the compensation order. Clearly, the Second Circuit is correct that this is a penalty and not compensation.

CONCLUSION

For the reasons given above, the Petition should be denied.

Respectfully submitted,

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